Petition

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ALEXANDER L. STEVAS,
CLERK

81-1973

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

William L. Irwin,

Appellant,

VS.

Montgomery County, Maryland et. al.

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

William L. Irwin
7105 Unakite Court
Middletown, Maryland
(Appellant) 21769

Paul McGuckian
County Attorney
Attorney for Appellees
Executive Office Bldg.
Rockville, Maryland
20850

QUESTIONS PRESENTED FOR REVIEW

I. Were the Federal Laws for Positive Affirmative Action violated under Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974-(Public Law 93-508) as accorded the Appellant being a Vietnam Era-Disabled Veteran and rated as Qualified?

II. By violating the procedural "Order of Rank", were the actions taken against the Appellant Arbitrary and Capricious in nature as construed by Title VII of the Civil Rights Act of 1964 under Recruitment and Selection Techniques?

III. Due to the Appellant's disability, his sick leave for such, negating the Order of Rank, did it constitute a violation of the Appellant's civil rights as accorded him under Article IV, Section 2, and the Ninth Amendment to the United States Constitution?

IV. Is it in the interest of justice for the Petitioner to be denied due process of law in seeking proper redress of his

II

Grievance through the fault of the Montgomery County Human Relations Commission Investigator for failing to include or document all of the pertinent and relevant facts necessary to established the necessary Probative and Preponderance of Evidence?

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No. .....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM L. IRWIN,

Appellant,

VS.

MONTGOMERY COUNTY, MARYLAND et. al.

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPINIONS BELOW

The Court of Appeals of Maryland entered the Order of denial for the Petitioner's Writ of Certiorari based on the premise there was no showing that such a review was desirable or in the Public's interest. A copy of the Order dated January 26, 1982 is attached as Appendix A.

The Court of Special Appeals of Maryland affirmed the decision of the lower Court of

Montgomery County, Maryland on October 28, 1981. A copy of the decision is attached as Appendix B.

STATEMENT OF JURISDICTION

The Petitioner's Writ of Certiorari was denied by Order from the Court of Appeals of Maryland on 26 January 1982.

The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. Section 1254 (1) and Section 1257 (1), (2) and (3).

CONSTITUTIONAL PROVISIONS AND FEDERAL LAWS INVOLVED

1. ARTICLE IV, Section (2) of the United States Constitution provides in pertinent part:

"The Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

2. The Ninth Amendment to the United States Constitution provides in pertinent part:

"The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."

3. Title VII of the Civil Rights Act of 1964, under recruitment and selection techniques, provides in pertinent part: "Experience under Title VII indicates that the process of selecting applicants for employment is probably responsible for more discrimination------- whether consciously or unconsciously-------- than other areas of employment

practices."

4. The Vietnam Era Veterans Readjustment Assistance Act of 1974, Section 402-(Public Law 93-508), provides in pertinent part: "As well as being a "Disabled Veteran" or "Veteran of the Vietnam Era", the veteran also must be "Qualified" for the job. That is the veteran must be capable of performing a particular job, with in the case of the Disabled Veteran---- reasonable accommodation to his or her disability."

STATEMENT OF THE CASE

This is a simple case of "Discrimination" against a Vietnam Era-Disabled Veteran in which the Petitioner, William L. Irwin, was denied a promotional opportunity within a government agency that advocates affirmative action. This act of discrimination was accomplished through "Bureaucratic Chicanery", in violation of his Civil Rights, and due to

his disability, as a disabled veteran, and his sick leave for such disability.

The Written Record and the Appellant can show to this Honorable Supreme Court of the United States that substantial evidence does exist both in Preponderance and Probative value in favor of the Appellant, and that it refutes Montgomery County, Maryland's case as being "Fairly Debatable". The Written Record and the types of evidence adduced can substantiate the allegations of the Appellant that discrimination, by prejudicial means, did exist in the selection of the Lieutenant, or head supervisor for the Montgomery County Security Officers.

Through the selection of a lower rank personnel, by negating or contravening the Procedural Order of Rank it let a P.F.C. Security Officer become a full Lieutenant, over me as senior shift supervisor, at Corporal rank, did seriously violate the

Appellant's rights under the Positive Affirmative Action Law, Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974- (Public Law 93-508), as accorded the Appellant being rated as "Qualified" and as a Vietnam Era and Disabled Veteran.

The use of the Appellant's sick leave for his disability, as accorded him under "Reasonable Accommodation", was also being used or in accordance with Presidential Executive Order 5396 as signed in 1930.

Because of these discriminatory actions, or prejudicial practices, discrimination did exist by violating the procedural "Order of Rank" as construed by Title VII of the Civil Rights Act of 1964 under Recruitment and Selection Techniques, and by doing so deprived the Appellant the promotional opportunity.

It is to be noted that the procedural "Order of Rank" had been time honored since the inception of the Security Unit back in 1971,

and is honored within the other Montgomery County Department's that have established "Order of Rank". To contravene or negate this "Order of Rank" can only set a precedence for other Montgomery County Departments that have established "Order of Rank".

Further discrimination took place because of the Appellant's disability as based upon the department's sick leave policy and their interpretation of such both written and implied; thusly, such actions further deprived the Appellant of said promotional opportunity. This information was given to the Montgomery County Human Relations Commission Investigator, Lois Hackey, who failed to incorporate such information in her notes or in her final report. However, she was informed personally by the Appellant as to such information as related to the morning of 28 August 1978 when Mr. Damiani informed the Appellant that one of the main reasons for my non-selection was based upon the accepted practice within Montgomery

County Government that one's promotion is based upon their sick leave record. It is also to be noted that the Appellant had written to Lois Hackey on 19 May 1980, as established by the Written Record, asking her if she needed any more information to prove the Appellant's allegations.
Ms. Lois Hackey responded by her memo of May 29, 1980, also confirmed by the Written Record, stating that "If additional information is needed from you, you will be contacted." The Appellant was never contacted for any further information in regards to his allegations of discrimination in which he was deprived of a promotional opportunity due to his disability and sick leave for such.

REASONS FOR GRANTING THE WRIT

Borrowing a few words from the past from some of our great leaders; the words are extremely timely and very apropos to this case before the Honorable Supreme Court of the United States.

George Washington once said: "the due administration of justice is the firmest pillar of good government." And from the Honorable Chief Justice John Marshal as saying: since the early days of the Republic every citizen has been affected by the opinions from this High Court- "It passes on his property, his reputation, his life, his all." And went on to say: "It is emphatically the province and duty of the judiciary department to say what the law is. We must never forget that it is a constitution we are expounding-- intended to endure for ages to come, and consequently, to be adopted to the various crises of human affairs." Thusly, I need not remind the Honorable Court, the Supreme Court

is the ultimate authority on the law, or on the powers of government under law, by the standards of the constitution.

It is here my contentions lie; the Honorable Supreme Court address itself to such gray areas of law as presented in my case, but also to the constitutional protection of rights accorded the Appellant, and to render a legal decision on the federal laws cited or their applicability in the Appellant's case against Montgomery County, Maryland.

The gray areas of concern, pertaining to law, consists of the Positive Affirmative Action Law of Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974- (Public Law 93-508) under the term "Qualified", Montgomery County, Maryland's defense of "Fairly Debatable" vs. preponderance and probative value of evidence, and the Honorable Judges' mere conjecture as stated from the Court of Special Appeals of Maryland, as found in Appendix B,""With respect to the second issue

issue involving "Procedural Order of Rank" we fail to find evidence of what this actually is. other than bald allegations of the Appellant."

For such other reason for granting the Writ is that it deals specifically with the Constitutional Rights as accorded the Appellant under Article IV, Section (2), and the Ninth Amendment to the Constitution of the United States.

And the final reason is to ascertain the fact that if the Federal Statutes are applicable in this case of discrimination, and if indeed they take precedence over municipal laws of Montgomery County and the laws of the State of Maryland.

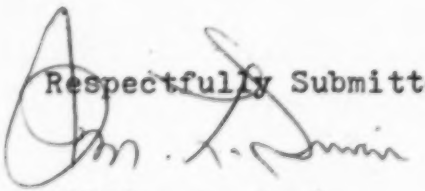
All Federal Questions in regards to Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, (Public Law 93-508), and the procedural "Order of Rank" as construed by Title VII of the Civil Rights Act of 1964 were raised in the initial Circuit Court filing, again in the Appellant's Brief to the Court of Special Appeals of Maryland and in his oral arguments before said Court.

The Appellant's case meets the acid test of probable cause and meets the burden of proof with preponderance and probative value of evidence. In a administrative proceeding, proof beyond reasonable doubt is not required as adjudged in the Berstein Vs. Real Estate Comm'n.-221 Md. 221, 156 A.2d 657 (1959).

CONCLUSION

For the foregoing reasons, the Petitioner, William L. Irwin, humbly and respectfully requests that a Writ of Certiorari issue to review the Order of the Court of Appeals of Maryland, and the unreported Decision from the Honorable Judges of the Court of Special Appeals of Maryland.

Respectfully Submitted,



William L. Irwin
7105 Unakite Court
Middletown, Maryland 21769
Appellant

Appendix

Appendix A-1

WILLIAM L. IRWIN

v.

MONTGOMERY COUNTY, MARYLAND et al.

In the
Court of Appeals
of Maryland

Petition Docket No. 509
September Term, 1981
(No. 292, September Term, 1981
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: January 26, 1982.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 292

September Term, 1981

WILLIAM L. IRWIN

v.

MONTGOMERY COUNTY,
MARYLAND, et al.

Moylan
Couch
Bishop,
JJ.

PER CURIAM

Filed: October 28, 1981

Appellant B-1

William L. Irwin, the appellant, claims in this appeal that the Circuit Court for Montgomery County erred in affirming a decision of that county's Human Relations Commission (HRC) which had dismissed a discrimination charge brought by the appellant when he was passed over for promotion in the Department of Facilities and Services (DFS).

The Facts

The record discloses that in 1978 the DFS advertised a vacancy for the position of Supervisor, Security Officers. The appellant and eight others applied; another applicant, found to be "well qualified" was selected. The appellant was rated "qualified." Mr. Irwin appealed the selection to the Personnel Board, contending he was more qualified than the person selected. Subsequently the Board dismissed appellant's appeal, concluding there was no evidence of non-merit consideration in the selection process. No appeal was taken by appellant from this decision; rather, Mr. Irwin conceived another route of attack.

Some six months later, the appellant filed a complaint with the HRC, based on discrimination due to his physical handicap (resulting in a 40% disability), against DFS and the Personnel Board. After investigation HRC found the evaluation method used was fair and in conformity with the County Merit System Law, and thus dismissed appellant's complaint. Thereafter the appellant appealed this decision to the circuit court, which affirmed. This appeal ensued.

Appendix B-2

The Issues

While the appellant has presented six questions, we deem them to involve three considerations:

(1) Was the appellant discriminated against because of his sick leave record?

(2) Was there a violation of "Procedural Order of Rank" constituting discrimination against the appellant?

(3) Were the Federal laws for affirmative action violated?

The Decision

(1) & (2)

We have carefully reviewed the record before the circuit court, as well as that of the HRC, and have been unable to find that the sick leave issue was raised. Accordingly, this issue may not be presented to this Court for the first time. Md. Rule 1085. With respect to the second issue involving "Procedural Order of Rank," we fail to find evidence of what this actually is other than bald allegations of the appellant. In our view the County's Merit System Law would take precedence in any event. The HRC found that the selection in this case was in conformity with the Merit System and we find no evidence to the contrary.

(3)

Federal Affirmative Action Law

Mr. Irwin further contends he was discriminated against

because the selection process violated Federal affirmative action laws. See § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C.A. § 794 (Supp. 1979). We disagree.

Section 504 was construed by the Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979). It dealt with a handicapped individual whose admission to a college nursing program had been denied because the college felt that her hearing disability would not allow her to work safely as a nurse. The Court stated that section 504 "requires only that 'an otherwise qualified individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." Id. at 405.

The HRC, which was affirmed by the circuit court, found that there were absolutely no facts to support appellant's contention that he was discriminated against because of his handicap and that a better qualified person was selected instead of the appellant. The latter finding, in itself, is dispositive because it takes the appellant out of the definition of "otherwise qualified." The appellant would have been "otherwise qualified" if he had been selected more qualified than, or equally qualified as, the other applicants. Because he was not, he is not within the section 504 protections, and even if he was, there is no evidence that he was discriminated against because of his handicap.

Appendix B-4

The short of Mr. Irwin's complaint is that, in his view, he is better qualified than the applicant selected. This has not been found to be true by a fair selection process.

ORDER AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

Appendix B-5